Supreme Court, U.S.
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No. ___

In The
Supreme Court of the United States

TERRANCE FOXWORTH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Where a State Highway Patrolman, incident to a routine traffic stop, smells (if he does) the aroma of marijuana and later observes a drug dog "react to the trunk" of the car, do such facts justify a finding that there was probable cause to search the trunk and seize therefrom a large sum of U.S. currency found therein because, in the officer's judgment, it was drug money?

II

Assuming a valid traffic stop for speeding occurred, does probable cause to seize a large sum of money found in the trunk of the car arise from the naked and unclad fact that the passenger was ticketed for a having a "joint," *i.e.*, a minuscule quantity of marijuana in his shirt pocket, which was readily surrendered to the officer in the wake of an inquiry as to whether there were any drugs in the car?

III

Absent proof of a *nexus* between "a large sum of money," located by a State Trooper in the trunk of a car following a traffic stop and absent any illegal activity (save and except the possession of a marijuana cigarette by the passenger) was there nonetheless a sufficient basis for the forfeiture of this money to the government under favor of **21 U.S.C., §983,** *et al.*?

IV

Assuming an adverse inference arises from the Claimant's assertion of the Fifth Amendment during his deposition, can it provide a sufficient basis for the grant of summary judgment in favor of the government in a civil forfeiture case?

V

Can a court require an individual, whose money was seized by a State Trooper in the wake of a speeding violation, to prove the money was not acquired as the product of any illegal activity or suffer it being forfeited to the government?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, 118,170.00 in U.S. Currency and Terrance Foxworth, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States District Court for the Northern District of Ohio, which judgment became final on October 9, 2007, when the Sixth Circuit Court of Appeals affirmed the lower Court's decisions.

OPINIONS BELOW

The original Opinion of the Sixth Circuit Court of Appeals, against which this *Petition* is directed, became final (**Appendix "A," at p. 1a)** on October 9, 2007 when rehearing was denied. The written ruling made by the District Court is designated **Appendix "B," at p. 10a**. The Order denying rehearing occurred on October 9, 2007. It is designated **Appendix "C," infra, at p. 19a.**

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The original judgment of the Sixth Circuit Court of Appeals, as indicated above, was entered on February 27, 2002. As indicated above, it became final when on October 9, 2007, when the Petition for Rehearing was denied. The jurisdiction of this Court is invoked under **28 U.S.C., §1257(3).**

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the United States Constitution involved in this case are the Fourth, Fifth, and Sixth Amendments. The pertinent texts of each of these are set forth below:

1. **Fourth Amendment:** "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. **Fifth Amendment:** "No person. . . shall be compelled in any criminal case to be a witness against himself. . . ."

3. **Sixth Amendment:** "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of Counsel for his defense."

STATEMENT OF THE CASE AND FACTS

The government, based on an "adopted" seizure (*i.e.*, a seizure made by an Ohio State Highway patrolman on the Ohio Turnpike), of the $118,170.00 involved in this case, was granted a "Motion For Summary Judgment." This resolution resulted in the forfeiture to the government of the funds sought by the Petitioner, as the Claimant.

The Forfeiture Compliant itself, centralized herein was filed on February 5, 2001. Foxworth, as the Claimant (here of the Petitioner), seasonably filed his Claim for these funds on February 2001. He also seasonably filed an Answer and a Jury Request. The Court upon its consideration of the government's "Motion For Summary Judgment" and the response pleadings filed by the Claimant, ultimately granted the government's motion. ***See* Appendix "B[1]" at 10a, *et. al.***

The critical facts here are easily stated. Indeed, the central thrust of the facts in the Record, and the trial Court's patently flawed rationales, surfaced almost immediately from the very first paragraph. More specifically, the government has made the very precise argument that:

> In the instant case, *Foxworth asserted his Fifth Amendment privilege not only with respect to his work history but, more importantly, as to the source of the defendant currency.* Foxworth even asserted his Fifth Amendment privilege when asked if the defendant currency was his. *Certainly this Court can rightly infer*[2] that the

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[1] The references to Appendix "B" at p. ___, are to the Opinion rendered by the District Court. Those to Appendix "A" are to the Sixth Circuit's Opinion

[2] Surely if it happened that the District Court *inferred*, as we believe was the case, the allegations in the Complaint were true, then clearly any reliance thereon as being dispositive cannot based on the arguments made below be defended in law, logic or common sense.

> allegations in the government's complaint are true and that the Defendant currency represents illegal drug proceeds.

Motion for Summary Judgment, p. 5.

In dealing with the segment of the government's Motion, referred to above, the Court after inferentially rejecting the various cogently compelling arguments (made in Claimant's response pleadings), rather rotely adopted the government's conclusory assertions. Arguably, the Court regarded them as making for a valid basis to, both, grant the government's Motion, and to reject all of the Claimant's various arguments. Still the District Court's recitation of the facts (set forth below) sufficiently postures some of the dispositive factual patterns for this Court:

> . . . an officer of the Ohio State Highway Patrol stopped a car for speeding on the Ohio turnpike. The Claimant was the driver. The officer smelled marijuana coming from the interior of the car, and after the officer inquired a passenger produced [from his shirt pocket] a small bag containing marijuana. The officer called a second officer who had a drug detection dog. *The dog alerted the officers to the trunk*, in which a blue bag containing the Defendant Currency was found.
>
> The officers seized the currency. . . and turned the matter over to the federal Drug Enforcement Agency ("DEA"). The DEA began administrative forfeiture proceedings, during which the Claimant alleged ownership of the

> currency. He stated that he was indigent, earning only about $500.00 per month, and moved to proceed in *forma pauperis. A man named Willard Osborn, who has pled guilty to federal drug trafficking charges, informed the Plaintiff that he and the Claimant have been involved in numerous drug transactions together.*[3]
>
> The Plaintiff then filed this action and deposed the Claimant. At the deposition, he asserted his Fifth Amendment rights against self-incrimination. . . .*The Plaintiff seeks summary judgment because, by not answering questions during the deposition, the claimant has not established a genuine issue of material fact for trial.*

(Emphasis supplied.) **Appendix "B," at p 11a.**

Another point of critical significance to this cause distills from the fact that the trial Court (in dealing with, and validating, certain critical positions taken by the government, and in summarily rejecting other cogent arguments made by the Petitioner) simply ignored certain critical showings. Indeed, all along

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[3] The plaintiff's Motion actually showed this Osborn person had only said: years ago that "Foxworth *attempted* to purchase kilos of cocaine from him." Thus, one must wonder how the Court came up with the idea Foxworth had been, as said in the quote, involved in "numerous drug transactions" with this person. Perhaps (at long last) the government will seek to justify this misstatement. In so doing, counsel is reminded Osborn testified that he "never" sold any drugs to Terrance Foxworth.

Petitioner had contended the original stop, and most assuredly the search and the seizure, were made in violation of his Fourth Amendment rights. How then could it be said there were no genuine issues here?

Be all that as it may, the facts show the Court, in summarily denying Petitioners' Fourth Amendment contentions, also failed to reckon with the fact that the *onus* was on the government to prove the police acted constitutionally. The point being, once the Constitutional issue was raised in a warrantless search context, the burden was on the government.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

At the heart of the various arguments made below is the unassailable contention, that under **21 U.S.C., §881(a)(6),** money, whether seized lawfully or unlawfully (as is being contended here), is only subject to forfeiture if the proof shows: (a) it was furnished or intended to be furnished in exchange for a controlled substance; (b) it was traceable to such an exchange; or (c) was used or intended to be used to facilitate a violation of the federal drug laws. Given then the recently enacted "Asset Forfeiture Reform Act" (**21 U.S.C., §983, *et al.*),** it is also clear that no longer is it enough for the government to merely show *probable cause* (which in any event it failed to show here). To prevail on a forfeiture claim, the government must now show by the preponderance of the credible evidence that the money was related to some type, or form, of drug activity.

In addition, clearly the Court's position shows he fully credited a statement he (not the government) attributed to Willard Osborn. This alleged statement is assailable for several cogent reasons. Indeed, the government will surely concede that Osborn never stated he had consummated any drug deals with the Claimant. Simply put, the bottom line is the Petitioner forthrightly denied (in his Answer and in his Deposition) that he ever had any drug dealings, or even any such discussions with this Osborn (when he was waiting to be sentenced). Clearly this created a factual dispute; hence, it required jury action. So postured, the question then is how could the trial Court summarily resolve this issue against the Petitioner? Even more startling is how could the Sixth Circuit endorse this nonsense, as it did?

Another point of critical significance to this cause distills from the fact that the Courts below simply ignored the compelling thrust of the *Civil Asset Forfeiture Reform Act of 2000*. This legislation, which was codified for the most part in **21 U.S.C., §983**, imposed on the government the burden of proving "by a preponderance of the evidence, that the property is subject to forfeiture." *See* **21 U.S.C., §983(c)(1)**. *Also see* **United States v. Real Property, etc., 241 F.3d 796, 799-800 (6th Cir. 2001)**.

With the burden so placed, it seems clear the trial Court's probable cause analysis is indisputably flawed. Indeed, almost beyond dispute. Given Petitioner truly raised these various, very clear-cut, Fourth Amendment issues, it follows that inasmuch as certain resolutions (inferentially made by the Court) were made without the benefit of any factual findings, they

must be viewed as arbitrary. In any event, the law is clear: the District Court could not arrogate to himself the power to resolve these Fourth Amendment issues without the benefit of any sworn testimony. Indeed, as we see it, any conclusion that the search here was lawful comes very close to saying Petitioner's Fourth Amendment arguments (that the stop was illegal, that the use of the dog was improper, as was the search of, and the seizure from, the trunk) could be viewed as not even raising an issue that was worthy of any meaningful discussion.

Lastly, it should be noted the Court's finding (or expressed supposition) that the funds in this case were "earned through illegal activity" (**Appendix "B," at p. 16a.**) simply cannot survive meaningful scrutiny. This follows because such a finding is not equivalent to a finding that it was acquired through drug activity.

ARGUMENT I

WHERE A STATE HIGHWAY PATROLMAN, INCIDENT TO A ROUTINE TRAFFIC OFFENSE STOP, SMELLS (IF HE DOES) THE AROMA OF MARIJUANA AND LATER OBSERVES A DRUG DOG[4] "REACT TO THE TRUNK" OF THE CAR, SUCH FACTS DO NOT JUSTIFY A FINDING THAT THERE WAS PROBABLE CAUSE TO SEARCH THE TRUNK AND SEIZE THEREFROM ANY LARGE SUM OF

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[4] The most recent decisions dealing with asserted dog alerts view them most skeptically.

U.S. CURRENCY FOUND THEREIN BECAUSE IN THE OFFICER'S JUDGMENT IT WAS DRUG MONEY.

There can be no doubt that the Fourth Amendment applies to civil forfeiture actions. *See* **One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, at 969 (1965).** Here, of course, we deal with a warrantless search, which was challenged (in the District) as being unconstitutional. Yet, it is clear here, the trial Judge summarily eliminated all of the Fourth Amendment issues from the case. This the Court did without the benefit of a hearing; hence without resolving any of the factual disputes. Indeed, had one been granted, at the very least, the government would have been required to show the *warrantless search and seizure* made herein fell within the ambit of the "automobile exception" to the warrant requirements. *See* **Carroll v. United States, 267 U.S. 132 (1925).**

On the other hand, as the Court saw it, and indeed, actually said so, "the circumstances of the traffic stop *alone* demonstrate probable cause to believe that there was a substantial connection between the money and drug trafficking." **Appendix "B."** Aside from the fact that the seizure here, like all seizures, requires probable cause, there is nothing in these facts that makes for the appropriate showing required to conduct the warrantless seizure made from Petitioner's car.

Indeed, the trial Court in granting summary judgment can very easily be said to have absolutely ignored the issue as to the lawfulness of the stop and the search. Indeed, the Court did so although the government had not even bothered to make a Fourth

Amendment argument anywhere in their "Motion For Summary Judgment." Also, it can be said the Appellant, who had limited his responses to the government's argument made in quest for Summary Judgment, was ambushed on the Fourth Amendment issue. Simply put, the finding here being isolated was that:

> Foxworth hasn't, because he cannot, offer any evidence by affidavit or otherwise refuting that the Defendant Currency is proceeds from drug trafficking in violation of **21 U.S.C., §841(a)(1)** and is therefore subject to forfeiture to the United States pursuant to **21 U.S.C., §881(a)(6).**

Arguably, this pathetic thesis is what resulted in the District Court ultimately making the dispositive ruling that the Petitioner's invocation of the Fifth Amendment during his deposition "was not a substitute for evidence in support" of his claim. **(Appendix "B," at p. 17a.)** Granted the invocation of the Fifth Amendment is not a substitute for evidence to support a claim in a forfeiture case. On the other hand, it is beyond dispute that "property of private citizens cannot be seized and held in an effort to compel the possessor to 'prove lawful possession,'" **United States v. One Residence and Attached Garage Of Anthony Accardo, etc., 603 F.2d 1231 at 1234 (7th Cir. 1979).** Also see our Court's Opinion in **United States v. United States Currency, 626 F.2d 11, at 15 (6th Cir. 1980)** and the Opinion in **United States v. Seriver, 67 F.3d 525 (9th Cir. 1999).**

With this being so, it follows the forfeiture here given the discursive reasons expressed by the Court (or for any other reason) cannot survive meaningful scrutiny. The same is true since despite the positions taken by the Sixth Circuit, which denied our Motion for Rehearing more than four (4) years after it was filed. (*See* **Appendix "C," infra, p. 19a.)**

ARGUMENT II

ASSUMING A VALID TRAFFIC STOP OCCURRED, PROBABLE CAUSE TO EVEN SEIZE A LARGE SUM OF MONEY FOUND IN THE TRUNK OF THE CAR DOES NOT PERFORCE ARISE FROM THE NAKED AND UNCLAD FACT THAT THE *PASSENGER* WAS TICKETED FOR HAVING A MINISCULE QUANTITY OF MARIJUANA IN HIS SHIRT POCKET.

In this case, the Court somehow convinced itself the State troopers were "justified in searching the trunk" (**Appendix "B," at p. 16a**). This was said to be so because, according to the officers, a "drug dog" had supposedly "alerted the officers to the trunk" (**ibid.**) – if you can believe that – since no drugs were found in the trunk. Continuing, however, although recognizing that "no drugs were found in a search of the trunk," still it regarded the alert as being virtually dispositive. Here it was said:

> ... the presence of a bag containing $118,170.00 in cash is suspicious when viewed in connection with the presence of marijuana. [Further it was said:] *The circumstances of the traffic stop alone*

> *therefore demonstrates probable cause to believe there was a substantial connection between the (sic) money and drug trafficking*. [And for that reason:] the search was lawful.

(***Ibid.***). (Emphasis supplied).

In other words, given that the marijuana was found on the passenger, for which the passenger was given a ticket (as the law of Ohio requires in cases of this ilk, **State v. Jones, 88 Ohio St. 3d. 431 [2000]),** the Court reasoned the passenger's exclusive possession of this user quantity of marijuana in his shirt pocket demonstrated a *connection* between the money found in the car's trunk and "drug trafficking." ***Cf.*** **Moore v. Virginia, 272 Va. 717 (2006), *cert. granted*, 128 S. Ct. 28 (2007).**

Here too it should be understood that officers on the scene, did not make a charge that even sought to connect the Claimant to marijuana found in the passenger's pocket. Also the actual charge made against him was for the "minor misdemeanor" of possession (**R.C. of Ohio, §2925.11[3][a] and R.C. of Ohio, §2929.21**) – an offense for which a "ticket" is given.

With this being so, it could not be more obvious why the government had to conjure up, as it did, and artificially (in our judgment) impute to the officers, a probable cause basis for not only searching the car, but for seizing the money. Also it is understandable why the government failed to make the effort to defend the Court's specious finding that "the seizure was lawful" (**Appendix "B," at p. 16a**). Be all that as it may, for

what it is worth, it is indelibly clear this Court in , ad **United States v. Real Property In Section 9, Town 29 North, Range 1 West Township Of Charlton Otsego County, Michigan, et al., 241 F.3d 796 (6th Cir. 2001)**, opted Congress' rejection of the serious flaws in what had heretofore been the method by which the government had been able to seize and forfeit private property. Indeed, in writing on this subject it was said, perhaps by the First Circuit Court to address this issue, that:

> [t]he Civil Asset Forfeiture Reform Act of 2000 **[21 U.S.C., §983]** ... *requires the government to prove the connection* between the property to be forfeited and the drug activity by a preponderance of the evidence, *rather than to prove merely probable cause to believe there is a connection.*

United States v. 5 S. 351 Tuthill Road, Naperville, Illinois, 233 F3d 1017, at 1023 (7th Cir. 2000). (Emphasis supplied.)

If nothing else the above case makes it clear this cause should have been reversed. This is particularly so since the District Court's Opinion is flawed in the first instance by the fact that it failed to recognize it was not a Petitioner's burden to prove he had legally acquired these monies. It was this gross failure in the Court's expressed rationale that arguably caused the Court to regard the assertion of the Fifth Amendment privilege (by Foxworth) as having erected an insurmountable barrier to the validation of his claim. Even this is not all. Clearly, this flawed thinking eliminated any need whatsoever for the government to

prove (despite **21 U.S.C., §983)** any *nexus* whatsover between seized funds and any illegal *drug* activity. Obviously then, if the Court is convinced that money in these circumstances found was the product of some "illegal activity," this is enough. (**Appendix "B," at p. 16a).**

Actually the District Court's ruling did even more than that. It also eliminated any need on the government's part to prove the property was not illegally seized – although the burden was likewise on the government to prove the warrantless search was lawful. *See* **One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, at 696 (1965).** And, it eliminated any need for the government to prove these funds could be forfeited. As the Court saw it, forfeiture was justified because a dog had "supposedly" signaled[5] the presence of the odor of a contraband. Also, the Court was likewise of the belief the forfeiture of these funds was not excessive. (*See* **Austin v. United States, 509 U.S. 602 [1993].**) And, the Opinion also shows a conviction that no issue as to this being so could possibly be said to exist.

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[5] Given that whether the dog actually did give off a signal is a subjective call, one has to wonder in this circumstance whether this even happened. On the other hand, there was no evidence the dog merely reacted to the money itself. And, the government is yet to claim he did. Lest we forget, the Court found the dog alerted, because the officer said he did, to the trunk (**Apx. "B," at p. 11a**).

ARGUMENT III

ABSENT PROOF OF A NEXUS BETWEEN A LARGE SUM OF MONEY LOCATED BY A STATE TROOPER IN THE TRUNK OF A CAR FOLLOWING A ROUTINE TRAFFIC STOP, AND ILLEGAL DRUG ACTIVITY, NO BASIS FOR THE FORFEITURE OF THESE FUNDS EXISTS UNDER FAVOR OF 21 U.S.C., §983 *et. al.*

The law is clear, indeed it has been specifically so held by one Court, that:

> [T]he government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking activity or some other sinister activity. Moreover, the government may not require explanations for the existence of large quantities of money absent its ability to establish a valid narcotics-nexus.... Property of private citizens simply cannot be seized and held in an effort to compel the possessor to prove lawful possession.

United States v. 506,231 In U.S. Currency, 125 F.3d 442, at 454 (7th Cir. 1997).

The critical point made in all this flows from the fact, obvious to some of us, that insofar as the funds involved in this case were concerned, they would have been impervious to forfeiture under Ohio statues even if Foxworth, rather than the passenger, had the

marijuana in his shirt pocket. This follows because Ohio is one of those States that requires as a predicate to any forfeiture of this ilk a felony drug conviction.[6] Obviously, the State troopers knew they lacked any evidence whatsoever to even make a felony drug charge. Simply put, **R.C. of Ohio, §2901.01(13)(i),** defines contraband in this context as any property, except real property, used in the commissicn of any drug offense. With this definition in mind, it is apparent why the State manipulated the Justice Department's procedures for the adoption of these State seizures. *See Justice Department Policy On Asset Forfeiture*, Directive No. 93-1, reprinted in 52 CrL 2071 (January 30, 1993).

Here too, it should be noted there was an issue raised in our pleadings as to whether this procedure was complied with. Of significance then is the fact that there was no showing made by the government that the State prosecutor declined to pursue Sate forfeiture procedures. Proof of such a disinclination was mandated by the Justice Department's Directive (referred to above), as an necessary prerequisite to the government *adopting* a State seizure. Yet, one reading the Court's Opinion would understand that no issue was presented by this case as to whether it was even necessary for the government to comply with the "Directive" referred to above.

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[6] Even the government must prove an underlying narcotics violation in order to prevail on a forfeiture claim. **United States v. U.S. Currency, 863 F. Supp. 442 (W.D. Kentucky, 1994).**

ARGUMENT IV

GIVEN A CLAIMANT IN A CIVIL FORFEITURE CASE HAS AN ABSOLUTE RIGHT TO AN ADVERSARIAL HEARING ON THE FOURTH AMENDMENT ISSUE OF PROBABLE CAUSE TO SEARCH AND TO SEIZE, THE GRANT OF A MOTION FOR SUMMARY JUDGMENT WITHOUT THE BENEFIT OF A MEANINGFUL RESOLUTION OF SUCH ISSUES (WHEN RAISED BY A CLAIMANT) CANNOT SURVIVE MEANINGFUL SCRUTINY.

In this case, early on, the Fourth Amendment issues involving the stop, the seizure, and the search of his vehicle, along with the seizure therefrom of the funds in this case, were all formally challenged – indeed in Petitioner's **Answer To Complaint.** Yet, the District Court in granting Summary Judgment without the benefit of any type of evidentiary hearing, both, arbitrarily and summarily concluded that there was no genuine issue of the fact had been raised by the Claimant. Clearly, this ruling validated the seizure of these funds as well.

Given the trial Court's ruling that the search of the car and the seizure of these funds was lawful was a most critical factual determination, it is at once obvious this determination could not properly be made without the benefit of appropriate findings of facts and conclusions of law. The District Court's conclusion is even more startling given the further fact the Claimant had no opportunity to rebut the government's evidence designed to show the officers'

actions were constitutional in all respects. ***Cf.*, United States v. Real Property Known As RR 1, Box 137-B Cutler, Ohio, 24 F.3d 845, 849-850 (6th Cir. 1994).**

Our position, simply put, has continued to be that surely the trial Court was required, in ruling on both the government's Motion For Summary Judgment and the Claimant's various contentions (including his Fourth Amendment issues), to consider the entire record. And, surely this should have entailed giving meaningful consideration to the Claimant's various submissions. These included Foxworth's denials (as were set forth in his Answer to the Complaint, which raised factual issues) and, it included his Deposition testimony in which he denied under oath he had ever had engaged in drug transactions with Osborn. (*See* **Appendix "B," at p. 16a).**

Since the District Court simply adopted the government's thesis on the Fourth Amendment issues, which ran afoul of the test for Summary Judgment. Clearly the Court's action can be compared to the ruling of a Magistrate who makes an *ex parte* determination that an affidavit sets forth probable cause to search. And, we know such a determination cannot satisfy the government's burden in a forfeiture case. Stated another way, it could not possibly be held that the Judge's summary conclusion made without the benefit of any testimony showing the trooper had probable cause to stop, to detain, to search and to seize sufficiently provided Petitioner all the due process to which he was entitled.

ARGUMENT V

AN ADVERSE INFERENCE FROM THE CLAIMANT'S ASSERTION OF THE FIFTH AMENDMENT CANNOT SUFFICE AS A SUFFICENT BASIS FOR THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE GOVERMENT IN A CIVIL FORFEITURE CASE.

Almost forty (40) years ago this Court decided **Simmons v. United States, 390 U.S. 377 (1968)**. Given that the Court determined in **Simmons** and individual is not required to surrender his Fifth Amendment privilege against self-incrimination to establish a Fourth Amendment claim, the question then is how can it be concluded that our Petitioner's exercise of the privilege created an adverse inference in the context of a forfeiture case?

Indeed the District Court determined that appellant (as the Claimant in this forfeiture case at the District Court level) had, by asserting the Fifth Amendment to various questions put to him during his Deposition, actually created an insurmountable barrier to his claim lodged herein. As put by the Court, having asserted his Fifth Amendment privilege, there was no way Foxworth's claim could be validated even against the government's naked contentions that the *res* involved herein was "drug money." (**Appendix "B," at pp. 11a and 16a-17a.**)

It is most significant that the sole basis for the government's "Motion For summary Judgment," was the Claimant's assertion of the Fifth Amendment. The

government did, however, attempt to embellish its arguments with is own reference to Osborn's sworn statement. Thus, in making its ruling the District Court not only distorted what Osborn had actually said, the Court attached huge significance to the assertion that the "dog alerted the officers to the trunk" of the car (***id.*, pp. 15a-16a**). In our judgment in dealing with the trooper's statement that the dog alerted on the trunk of the car, it is especially strange that other than the money, nothing illegal was found inside the trunk of the car.

So postured, even if one ignores the possibility the officer lied about this alert having taken place, it is still possible the officer subjectively sensed the dog's actions were an alert without realizing that his conclusion, however honest, was more a product of a hope, conjecture, exaggeration, self-suggestion, or imagination than of a keen sense of observation. This is particularly so since the dog apparently had to alert (or the officer had to say so) if the officer was going to conduct a search of the trunk.

ARGUMENT VI

A COURT CANNOT REQUIRE AN INDIVIDUAL WHOSE MONEY WAS SEIZED BY A STATE TROOPER TO PROVE THE MONEY WAS NOT ACQUIRED IN THE WAKE OF ANY ILLEGAL ACTIVITY OR SUFFER IT

BEING FORFEITED TO THE GOVERNMENT.

The warped thinking of the government (as shown by the arguments made in its "Motion For Summary Judgment," which were rotely adopted *in toto* by the trial Judge) to the contrary, notwithstanding, the burden of proving property is subject to forfeiture was placed by statement on the government. Indeed, even if only probable cause was a sufficient basis for a forfeiture, it has been cogently held that:

> As far as we can tell, no court in the nation has yet held that, standing alone, the mere existence of currency, even a lot of it, is illegal. We are certainly not willing to be the first to so hold Absent other evidence connecting the money to drugs, the existence of money or its methods of storage are not enough to establish probable cause for forfeiture under §881.

United States v. $506,231 in U.S. Currency, 123 F.3d 442, at 452 (7th Cir. 1997).

On the other hand, it seems clear here that: what the Court apparently overlooked is that, to be sufficient to make a case for forfeiture, the government's proof must be free standing. And, this proof standing alone must establish, not be probable cause, but rather by "a preponderance of the evidence" that the property is subject to forfeiture. *See* **21 U.S.C., §983(c)(1), (2) & (3).** With this being so, it would not be enough to say, as the District Court did, that "the government [only] has the initial burden of demonstrating probable cause for the forfeiture"

(Appendix "B," at p. 13a) and that once probable cause is shown (if it was shown here) the claimant would lose unless he proved a lawful source for the money.

Granted this may very well be the way it was before Congress eliminated the injustice involved in the probable cause standard. Indeed, given the Asset Forfeiture Reform Act of 2000 (**21 U.S.C., §983, *et al.***), no longer is it the law that the Claimant's burden in forfeiture cases is heavier than the government's. *See* **Lilienthal's Tobacco v. United States, 97 U.S. 237, at 268 (1877).**

Simply put, arguably it used to be, as the trial Curt apparently still sees it, that once the government proves probable cause, the Claimant must disprove the government's case or prove an affirmative defense, such as innocent ownership. Obviously it was because this was "inherently unfair to claimants," that Congress enacted the "Asset Reform" statute referred to above. What should also be understood (in the context of the Court's thesis) is that while the trial Court concluded that one Willard Osborn had made a "sworn state[ment] that he and the Claimant were involved in illegal drug transactions together" **(Appendix "B," at p. 15a).** Now it is compellingly significant that the government never made any such contention. Indeed, in failing to make any such contention, it is clear the government was fully aware that Osborn had testified, during his deposition, that he *never, ever*, sold any drugs to Terrance Foxworth. (Counsel opposite is invited to make the charge this is not so.)

Here, the point to be reckoned with is the indelible fact that the government had only contended in its "Motion for Summary Judgment" that Osborn has sworn "Foxworth had *attempted to purchase kilos of cocaine*" from him. (Emphasis supplied.) And, of course, Osborn's statement (made while he was in custody) was made in an obvious effort to curry the favor of the authorities. But even there Osborn had merely said these *attempts* had occurred (if they ever did) "in the middle or the late 1990's" and Foxworth denied this ever happened.

With this being so, it is at once apparent at least to some of us, as it should have been to Appeals Court, that there was no factual basis for the trial Court's thesis, relied on as a major premise for his syllogistic conclusion that:

> The Osborn statement and the Claimant's financial history together constitute strong evidence that the Defendant currency totaling $118,170.00, far more than the Claimant reported on his tax returns, was earned through *illegal activity*[7].

(Appendix "B," at p. 16a.)

Postured by the above flawed reasoning pattern, which was expressly relied on by the Court, it is not

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[7] The fact that the Court used the statement "illegal activity" in its dispositive resolution is significant. This follows because the charge made was those funds were acquired in the wake *of "illegal drug activity*, not illegal activity.

enough to simply wonder where the Court got the notion that Willard Osborn had indeed been "involved in drug transactions" with our Petitioner. Here, as well the government should reject the District Court's truly flawed thesis in this regard. This counsel should do even if he is unwilling to confess error – which is what he really should do. This follows because it is beyond dispute that Osborn never made the statement that he and Terrance Foxworth, the Petitioner, had in fact been, as the Court found to be a fact, "involved in illegal drug transactions together." (***Id.*, p. 5, Apx. p. 14**). Simply put, the Court creates that statement out of whole cloth.

Indeed, if counsel is wrong in this assessment his opposite should quickly point out what he deems to be the factual basis for the Court's statement. And, while so doing counsel should also explain the government to date has challenged our categorical position that Willard Osborn never made such a statement. Having said that, so that the Record is clear, it is worth repeating, the government did not, and cannot, argue, as the Court determined, that Foxworth and Osborn were "involved in illegal drug transactions together." (***Id.*, at p. 16a)**.

The upshot of the insuperable point here being made is that clearly the trial Court was operating without a factual basis when it premised its deductively reasoned conclusion on an absolutely false fact. This follows because, contrary to the Court's thesis, the government did not rely "essentially," or otherwise, on any "evidence" that included "the sworn statement of Willard Osborn that he and Claimant were involved in illegal drug transactions together"

(**ibid.**). Also, it cannot be overlooked the Claimant fully, sufficiently and specifically *denied* the statements made by this Osborn. Surely this denial was worth something. Given Petitioner's denials: how then could the Court resolve this credibility dispute against the Petitioner?

On the other hand, even if it were true (as Osborn testified, was the fact) that "in the middle or the late 1990's Terrance [Foxworth]" had a conversation with him and had *attempted* to get, from him, a kilogram or kilograms, the fact remains Osborn swore he "never came to an agreement with Terrance about the price." With this being so, the question then would be: how could this ancient history even tend to show money, found in Foxworth's possession five or six years later, could be regarded as proof it was *drug money* – a required predicate for a forfeiture under favor of **21 U.S.C., §881**.

While all this may be crystal clear to the government, or even to the District Court, surely this is something counsel should at least clear to this Court. This is important because there is really no way it can ever be made clear to this counsel. Granted, the fact that it can never be made clear to counsel may not be very important. Still this Court is entitled to an answer to this question that makes sense. What has been said so far does not.

CONCLUSION

The circumstances set forth by the government as providing a sufficient basis for the forfeiture of these

funds distilled into the following very specific findings made by the trial Court:

(1)

> "The circumstances of the traffic stop alone... demonstrate probable cause to believe that there was a substantial connection between the money and drug trafficking" and

(2)

> "Standing alone, the Plaintiff's evidence is sufficient to establish by a preponderance of the evidence that the Defendant Currency is subject to forfeiture."

Appendix "B," at p 16a.

Here, of course, it should suffice to simply note the circumstances before the Court did not include any showing that the Claimant had ever been arrested, for anything, or ever investigated for any drug related crime. Also, there was no evidence, absolutely none, that our Petitioner was involved in, or even suspected of being involved in, any type of illegal activity. And, just as surely (only moreso) there was no evidence connecting the money to any activity involving drugs.

With this being so, to say that because the passenger had an almost immeasurable amount of marijuana in his shirt pocket and a dog hit on the trunk, these facts alone show "a substantial connection" between the seized money and drug activity, makes absolutely no sense at all. And, just as

surely, saying that because some first time informant told a DEA agent that years ago the claimant tried to buy drugs from him proves the appellant was a drug dealer (despite appellant's denial he ever had such a conversation) is truly an example of flawed reasoning. This is especially so since there is no way the government will even attempt to defend the District Court's position as expressed above.

The bottom line then is this Court should not only reverse the grant of summary judgment, the Court should declare from the undisputed facts that final judgment should be entered in favor of the Claimant.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-4104

[Filed July 10, 2003]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
vs.	)
$118,170.00 IN U.S. CURRENCY, Defendant,	)
TERRANCE FOXWORTH, Claimant-Appellant.	)

BEFORE: DAUGHTREY and GIBBONS, Circuit Judges; MILLS. District Judge.*

RICHARD MILLS, District Judge:

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

FACTS AND PROCEDURAL HISTORY

On March 27, 2000, an Ohio State trooper stopped a vehicle for speeding on the Ohio Turnpike. Claimant-Appellant Terrance Foxworth was driving. The trooper detected the odor of burnt marijuana coming from the interior of the vehicle. When the trooper inquired, the vehicle's passenger surrendered a small amount of marijuana from his pocket. A second trooper arrived. His drug detection dog, Amoros, checked the vehicle and alerted to the trunk. A search of the trunk revealed a blue laundry bag. Inside the bag, concealed in plastic shopping bags and clothes, was $118,170.00. The trooper seized the Defendant Currency and turned the matter over to the Drug Enforcement Administration (DEA). The DEA initiated administrative forfeiture proceedings and Foxworth submitted a claim to the Currency. The Government filed a motion for summary judgment arguing the Currency was subject to forfeiture and that Foxworth had failed to refute the Government's evidence or to present a genuine issue of material fact. The district court granted the Government's motion. Foxworth appeals.

GENERAL BACKGROUND

The following shall be subject to forfeiture:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys,

> negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

21 U.S.C. § 881(a)(6). A seizure may be made without a warrant if there is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search. 18 U.S.C. § 981(b)(2)(B). A forfeiture action may also be predicated on forfeitable property "which was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency." 18 U.S.C. § 981(b)(2)(C).

Once property has been seized, "the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture." 18 U.S.C. § 983(c)(1). The aggregation of facts, each one insufficient on its own, may suffice to meet the government's burden. *United States v. $67,220.00 in U.S. Currency*, 957 F.2d 280, 284 (6th Cir. 1992) (citation omitted).

ANALYSIS

Defendant argues the motion for summary judgment should not have been granted because: (1) his Fourth Amendment rights were violated when the trunk was searched: (2) the Currency was seized without probable cause; (3) Government did not meet its burden by a preponderance of the evidence; (4) the Government did not trace the money to a specific drug transaction; and (5) the district court improperly drew an adverse inference from Foxworth's assertion of his Fifth Amendment rights.

A. *Fourth Amendment*

Foxworth first claims that the currency could not be forfeited because the trooper's search of the car violated his Fourth Amendment rights.

The initial stop was lawful as Foxworth was speeding. *United States v. Townsend,* 305 F.3d 537, 541 (6th Cir. 2002) (stating that a "police officer may effect a traffic stop of any motorist for any traffic infraction"). "To detain the motorist any longer than is reasonably necessary to issue the traffic citation, however, the officer must have reasonable suspicion that the individual has engaged in more extensive criminal conduct." *Id.* The smell of marijuana alone constitutes probable cause to believe that drugs are in the vehicle and will justify searching without a warrant. *United States v. Garza,* 10 F.3d 1241, 1246 (6th Cir. 1993). Not only did the trooper here smell marijuana, he discovered a small amount in the car. Lastly, the drug detection dog alerted to the trunk. The trooper's search of the trunk was not in violation of the Fourth Amendment.

B. *Probable Cause to Seize*

Foxworth's next argument centers around the Government's right to seize the money. A seizure may be made if there is probable cause to believe that the property is subject to forfeiture. 18 U.S.C. § 981(b)(2)(B). "A lack of probable cause to seize the [property] would permit its return to its owner. but [will] not, by itself, [end] the forfeiture proceedings." *United States v. One 1974 Learjet 24D, Serial Number*

24D-290, Mexican Registration XA-RMF, 191 F.3d 668. 673 (6th Cir. 1999). An inquiry into the probable cause to seize the property depends upon the evidence available at the time of seizure and whether the Government was justified in holding the property pending the dispositive ruling. In other words, the Court must question whether there was an adequate preliminary showing that the property was connected to illegal activity and thus forfeitable. *United States v. Real Property Known and Numbered as Rural Route 1, Box 137-B, Cutler, Ohio*, 24 F.3d 845, 850 (6th Cir. 1994).

Here, the district court relied on the facts of the traffic stop to find probable cause: the presence of marijuana; the alert to the trunk by Amoros the dog; and, the large amount of money found in Foxworth's trunk.

Foxworth claims probable cause was not established because there was only a small amount of drugs found in Foxworth's car and because it was produced by the passenger, rather than by Foxworth himself. Finding only small amounts of contraband does not preclude seizure. As for Amoros' reaction, courts have historically found that a drug dog's positive reaction to money is "strong evidence of [its] connection to drugs." *$67,220.00 in U.S. Currency*, 957 F.2d at 285. More recently, courts have been reluctant "to rely too heavily upon drug detection dog alerts to contaminated money because of evidence that there is widespread contamination of currency in circulation in certain areas of the country." *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212, 1216 (9th Cir. 2001). As a result, when there is no evidence

indicating the dog's reliability, the dog's alert is "probative but weak." *$67,220 in U.S. Currency,* 957 F.2d at 286.

"Absent other evidence connecting the money to drugs. the existence of money or its method of storage are not enough to establish" the property is subject to forfeiture. *United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 452 (7th Cir. 1997). However, "possession of a large amount of cash is 'strong evidence that the money was furnished or intended to be furnished in return for drugs.'" *United States v. Currency, U. S. $42,500.00*, 283 F.3d 977, 981 (9th Cir. 2002) (quoting *United States v. $93,685.61 in U.S. Currency*, 730 F.7d 571, 572 (9th Cir. 1984)).

Based on the presence of marijuana, the alert by the drug dog. and the large amount of money found in the trunk, we affirm the district court's finding of probable cause to seize the currency.

C. *Preponderance of the Evidence*

Foxworth next argues the Government did not prove, by a preponderance of the evidence, that the Currency was subject to forfeiture. When determining whether property is subject to forfeiture. the Court may rely on information gathered after the filing of the complaint. 18 U.S.C. § 983(c)(2).

In addition to the evidence recited above, the Government presented evidence of Foxworth's sketchy financial history. His tax returns, filed in 1996, 1997, and 1998, indicated he earned $13,454.00, $21,038.00, and $11,562.00 respectively. Foxworth did not file tax

returns for 1995, 1999, or 2000. The district court found this was additional evidence that the large sum of money found in Foxworth's trunk was illegally obtained.

The facts here are similar to a case recently decided by this Court. In *United States v. $174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003), the Court found that the claimants' "legitimate income was insufficient to explain the large amount of currency found in their possession." *$174,206.00 in U.S. Currency,* 320 F.3d at 662. Tax records showed that one claimant had never filed an income tax return and that the second claimant had filed returns in 1998 and 1999 showing income of only $15,147.00 and $15,995.00. respectively. Despite earning very little income, the claimants' safe deposit boxes contained $174,206.00. "This evidence of legitimate income that is insufficient to explain the large amount of property seized, unrebutted by any evidence pointing to any other source of legitimate income or any evidence indicating innocent ownership, satisfies the burden imposed by the statute." *Id.*

The district court also considered the sworn statement of William Osborn. Mr. Osborn submitted an affidavit stating that Foxworth had attempted to purchase kilograms of cocaine from Osborn on several different occasions in the late 1990s. A claimant's record of drug activity is a highly probative factor in the forfeiture calculus. *$67,220.00 in U.S. Currency,* 957 F.2d at 286. Foxworth places tremendous emphasis on the fact that he was not prosecuted for a drug crime in relation to the events of March 27, 2000. This is irrelevant as "forfeiture under § 881(a) is not

conditioned upon an arrest or conviction for a drug offense." *United States* v. *$10,700.00 in US. Currency,* 258 F.3d 215, 224 n. 6 (3d Cir. 2001).[1]

We agree with the district court that the Government met its burden here. The presence of marijuana, the alert by the drug dog, the large sum of unexplained money in Foxworth's automobile coupled with Osborn's statements is proof, by a preponderance of the evidence, that the Defendant Currency was subject to forfeiture.

D. *Fifth Amendment*

At his deposition. Foxworth did not answer any significant questions relating to this case and instead asserted his Fifth Amendment right against self-incrimination. Foxworth claims the district court improperly penalized him for invoking his Fifth Amendment right by allowing the Government's motion for summary judgment. The district court stated, "the assertion of the Fifth Amendment right, although a legitimate basis for refusing to answer

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[1] Foxworth also argues the Government failed to prove a "substantial connection" between the Currency and a drug offense. Section 983(c)(3) of Title 18 requires proof of a substantial connection only when the Government's theory of forfeiture is "that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense." Section 881 authorizes forfeiture for "all proceeds traceable" to an exchange for a controlled substance. 21 U.S.C. § 881(a)(6). Accordingly, the Government need not prove a substantial connection to a specific drug transaction when it advances a drug proceeds theory.

questions, is not a substitute for evidence in support of the Claimant's case," and cited *United States v. Certain Real Property 566 Hendrickson Blvd., Clawson, Oakland County, Mich.*, 986 F.2d 990, 996 (6th Cir. 1993). In *Certain Real Property*, the court held that a "[c]laimant cannot avoid completely his Rule 56 burden by merely asserting a Fifth Amendment privilege." *Id.* at 996. After all. "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Foxworth presented no evidence to refute the Government's case or to raise a genuine issue of material fact. Accordingly, Foxworth's claim that entering summary judgment penalized him for asserting his Fifth Amendment right has no merit.

CONCLUSION

We find the Government met its burden to prove, by a preponderance of the evidence, that the legally seized Defendant Currency was subject to forfeiture. We AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 1:01CV295

[Filed September 17, 2001]

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	)
$118,170.00 IN U.S. CURRENCY, Defendant.	)

MEMORANDUM OF OPINION

On February 1, 2001, the United States of America, plaintiff, filed this action seeking forfeiture of the Defendant Currency, totaling $118,170.00. On February 27, 2001, Terrance Foxworth, claimant, filed a claim for the property. On May 30, 2001, the Plaintiff filed a Motion For Summary Judgment (Docket No. 22) as to forfeiture. The parties have fully briefed these issues.

For the following reasons, the Motion For Summary Judgment is GRANTED.

I. *FACTS*

On March 27, 2000, an officer of the Ohio State Highway Patrol stopped a car for speeding on the Ohio turnpike. The Claimant was the driver. The officer smelled marijuana coming from the interior of the car, and after the officer inquired a passenger produced a small bag containing marijuana. The officer called a second officer who had a drug detection dog. The dog alerted the officers to the trunk, in which a blue bag containing the Defendant Currency was found.

The officers seized the currency believing it to be connected with drug trafficking, and turned the matter over to the federal Drug Enforcement Agency ("DEA"). The DEA began administrative forfeiture proceedings, during which the Claimant alleged ownership of the currency. He stated that he was indigent, earning only about $500.00 per month, and moved to proceed *in forma pauperis*. A man named Willard Osborn, who has pled guilty to federal drug trafficking charges, informed the Plaintiff that he and the Claimant have been involved in numerous drug transactions together.

The Plaintiff then filed this action and deposed the Claimant. At the deposition, he asserted his Fifth Amendment right against self-incrimination. On that basis, he did not answer any questions regarding his general work history, his wages and income tax returns, where he was going at the time he was stopped, and questions about the passenger. He also did not answer any questions about the blue bag or the Defendant Currency contained inside. The Plaintiff seeks summary judgment because, by not answering

questions during the deposition, the Claimant has not established a genuine issue of material fact for trial.

II. *LAW*

A. *Summary Judgment Standard*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his

favor." *Anderson*, 477 U.S. at 256 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48.

B. *Civil Forfeiture Standards*

Money used in connection with or to facilitate drug trafficking is subject to forfeiture. 21 U.S.C. § 881(a)(6). Property may be seized by state officers and transferred to federal authorities if there is probable cause to believe that the property is subject to forfeiture and the property is seized pursuant to a lawful search or arrest. 18 U.S.C. § 981(b)(2)(B) and (C). In judicial proceedings for civil forfeiture, the government has the initial burden of demonstrating probable cause for the forfeiture. It must show a reasonable ground for belief that there is a substantial connection between the seized money and an illegal transaction. *United States v. Dusenberry*, 201 F.3d 763, 766 (6th Cir.), *cert. denied*, 531 U.S. 925 (2000); *United States v. Certain Real Property*, 986 F.2d 990, 995 (6th Cir. 1993); *United States v. $67,220.00 In U.S. Currency*, 957 F.2d 280, 283-84 (6th Cir. 1992). Probable cause is measured at the time of the forfeiture hearing. *$67,220.00*, 957 F.2d at 284.

Once probable cause is established, the Court must determine whether the property is subject to

forfeiture. On April 25, 2000, Congress enacted a statute specifically defining the burden of proof in civil forfeiture cases. *See* 18 U.S.C. § 983(c) and (d).[1] The burden of proof is on the Government to prove by a preponderance of the evidence that the property is subject to forfeiture. If the alleged basis for forfeiture is that the Defendant property was involved in or facilitated a criminal offense, to meet its burden the Government must prove that there is a substantial connection between the property and the offense. The Government may rely on evidence gathered *after* the filing of the Complaint. 18 U.C.C. § 983(c)(1), (2), and (3); *see also United States v. Real Property In Section 9*, 241 F.3d 796, 797-98 (6th Cir. 2001); *United States v. Lot Numbered One of the Lavaland Annex*, 256 F.3d 949, 956 (10th Cir. 2001).

If the Government meets its burden of proof, a Claimant may assert the "innocent owner defense", to which the Claimant bears the burden of proof by a preponderance of the evidence. An "innocent owner" is one who (1) did not know of the conduct giving rise to the forfeiture, or (2) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property. 18 U.S.C. § 983(d)(1) and (2); *see also Lot Numbered One*, 256 F.3d at 956.

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[1] The statute applies to all forfeiture cases commenced on or after 120 days from the date of enactment, or August 23, 2000. Because this case was filed February 5, 2001, the new statute applies to this case.

III. *ANALYSIS*

The Plaintiff relies on essentially the same evidence to establish probable cause and the ultimate issue of forfeiture. The Court, therefore, addresses these issues together. In determining forfeiture issues, the Court must look to the totality of the circumstances. Accordingly, if the aggregate of the evidence warrants forfeiture, the property shall be forfeited even if individual items viewed in isolation do not justify forfeiture. *See $667,220.00*, 957 F.2d at 284-86.

The Plaintiff alleges that the Defendant Currency is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6) in that it was involved in and/or facilitated drug trafficking in violation of 21 U.S.C. § 841(a)(1). The Plaintiff essentially relies on the following items of evidence: (1) the speeding violation; (2) the smell of drugs and the production of a small amount of marijuana from the passenger in the car driven by the Claimant; (3) the indication of the drug detection dog of the presence of drugs in the trunk; (4) the amount of money involved and the fact that it was all cash carried in a bag; (5) the Claimant's financial history; and (6) the sworn statement of William Osborn that he and the Claimant were involved in illegal drug transactions together.

Certainly, officers of the Ohio State Highway Patrol are justified in stopping a car for speeding. When the first officer smelled drugs and the passenger produced a bag containing marijuana, he was justified in a further search. He called the second officer, who brought a drug detection dog. The presence of

marijuana justified use of the dog as part of the further search, and the dog alerted the officers to the trunk. The Sixth Circuit has stated that a positive reaction by a drug detection dog is "strong evidence of a connection to drugs". *$67,220.00*, 957 F.2d at 285. The officers were thus justified in searching the trunk. Although no drugs were found, the presence of a bag containing $118,170.00 in cash is highly suspicious when viewed in connection with the presence of marijuana. The circumstances of the traffic stop alone, therefore, demonstrate probable cause to believe that there was a substantial connection between the money and drug trafficking. The seizure was lawful. Pursuant to the forfeiture statute, the state officers were then authorized to turn the money over to the DEA. *See* 18 U.S.C. § 981(b)(2)(B) and (C).

The Government also relies upon the sworn state of William Osborn that he and Claimant were involved in drug transactions together. (*See* Plaintiff's Ex. 2.) It also relies on the Claimant's financial history. During the initial administrative forfeiture proceedings, he proceeded *in forma pauperis* based on his assertion that he earns only $500.00 per month. His tax returns indicate that in 1996, 1997, and 1998, he earned $13,540.00, $21,038.00, and $11,562.00 respectively. He did not file tax returns for years 1995, 1997, and 2000. The Osborn statement and the Claimant's financial history together constitute strong evidence that the Defendant Currency totaling $118,170.00, far more than the Claimant reported on his tax returns, was earned through illegal activity.

Standing alone, the Plaintiff's evidence is sufficient to establish by a preponderance of the evidence that

the Defendant Currency is subject to forfeiture. The Court, therefore, now looks to whether the Claimant has offered contrary evidence that creates a genuine issue of material fact for trial. He has not done so.

During his deposition, the Claimant did not answer any significant questions relating to this case, and instead asserted his Fifth Amendment right against self-incrimination. He claims that summary judgment is inappropriate because it penalizes him for asserting his constitutional rights. The Court disagrees. The assertion of the Fifth Amendment right, although a legitimate basis for refusing to answer questions, is not a substitute for evidence in support of the Claimant's case. *United States v. Certain Real Property*, 986 F.2d 990, 996 (6th Cir. 1993), *citing*, *United States v. Rylander*, 460 U.S. 752, 758 (1983). "Consequently, a blanket assertion of the privilege is no defense to a forfeiture proceeding [citations omitted], nor does it excuse the claimant's burden under Rule 56(e) of controverting the government's proof." *Certain Real Property*, 986 F.2d at 996.

In addition, nothing prevents the Claimant from offering evidence other than his own testimony. For example, he does not offer affidavits of other persons as to the source of the money, nor any documentary evidence showing that the money is his and was earned legitimately. The Court recognizes that under the current standards in 18 U.S.C. § 983, the Plaintiff bears the ultimate burden of proof as to forfeiture. Under Rule 56, however, the Claimant still must at

least offer evidence demonstrating a genuine issue of fact for trial. He has not offered any such evidence.[2]

IV. *CONCLUSION*

For the foregoing reasons, the Motion For Summary Judgment of the Plaintiff United States of America (Docket No. 22) is GRANTED. Accordingly, the Court hereby orders that the Defendant Currency, totaling $118,170.00, be forfeited to the Plaintiff.

IT IS SO ORDERED.

Issued: September 17, 2001

s/ John M. Manos
UNITED STATES DISTRICT JUDGE

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[2] For the same reason, the Claimant cannot demonstrate a genuine issue of fact for trial on the "innocent owner defense", an affirmative defense to which he bears the burden of proof. *See* 18 U.S.C. § 983(d)(1).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-4104

[Filed October 9, 2007]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
vs.	)
$118,170.00 IN U.S. CURRENCY, Defendant,	)
TERRANCE FOXWORTH, Claimant-Appellant.	)

BEFORE: DAUGHTREY and GIBBONS, Circuit Judges; MILLS, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk